

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

MIGUEL ANTONIO MONDACA,

Defendant.

NO: 2:21-CR-0130-TOR

ORDER DENYING MOTION TO
DISMISS COUNT 1 OF THE
INDICTMENT

BEFORE THE COURT is Defendant's Motion to Dismiss Count 1 of the Indictment. ECF No. 41. The United States is represented by AUSAs Alison L. Gregoire and David M. Herzog. Defendant is represented by Corwin A. Townsend and Christian Phelps. The Court has reviewed the record and files herein, the completed briefing, and is fully informed.

BACKGROUND

On September 21, 2021, Defendant was charged by Indictment with three crimes: attempted kidnapping of a child (Count 1), production of child pornography (Court 2), and distribution of child pornography (Count 3). ECF No.

1. On April 21, 2022, Defendant moved to dismiss Count 1 of the Indictment reasoning that “the undisputed facts evidence that the Government cannot prove the charge of attempted kidnapping beyond a reasonable doubt, as there is no evidence that Defendant . . . committed a substantial step, beyond mere preparation, unequivocally demonstrating that the crime of kidnapping would have taken place unless interrupted by independent circumstances.” ECF No. 41 at 2.

The Government opposes Defendant's motion, recites a lengthy set of facts it intends to prove at trial, and contends the Court must defer any insufficient evidence argument until the time of trial. ECF No. 42.

DISCUSSION

Federal Rule of Criminal Procedure 12(b)(2) allows a defendant to “raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.” A pretrial motion is generally “capable of determination” before trial if it involves questions of law rather than fact. *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9th Cir. 1986) (citation omitted). “[T]he district court must decide the issue raised in the pretrial motion before trial if it is ‘entirely segregable’ from the evidence to be presented at trial. If the pretrial claim is ‘substantially founded upon and intertwined with’ evidence concerning the alleged offense, the motion falls within the province of the ultimate finder of fact and must be deferred. *Id.*

1 Here, the parties do not agree on a set of facts nor their legal significance.

2 Accordingly, the Court must defer to the ultimate finder of fact, the jury.

3 **ACCORDINGLY, IT IS HEREBY ORDERED:**

4 1. Defendant's Motion to Dismiss Count 1 of the Indictment, ECF No. 41,
5 is **DENIED**.

6 2. The Pretrial Conference/Motions Hearing scheduled for May 12, 2022, is
7 **STRICKEN** from the Court's calendar.

8 The District Court Executive is directed to enter this Order and furnish
9 copies to counsel.

10 DATED May 11, 2022.



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12 A handwritten signature in blue ink that reads "Thomas O. Rice".
13 THOMAS O. RICE
United States District Judge